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10 Attorneys for Plaintiff, Thomas E. Perez
11 Secretary of Labor, United States
Department of Labor

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14)
15 THOMAS E. PEREZ, SECRETARY OF) Hon. Jeffrey S. White
16 LABOR, UNITED STATES DEPARTMENT)
17 OF LABOR,) Case No. 3:14-cv-05549-JSW
18 Plaintiff,)
19 vs.)
20 BAR-K, INC., a corporation; WALTER NG,)
an individual; BRUCE HORWITZ, an)
individual; and the BAR-K, INC. 401(k))
PLAN, an employee benefit plan;)
22 Defendants.)
23)

24 This action was filed by Plaintiff Thomas E. Perez, Secretary of Labor, United States
25 Department of Labor (the “Secretary”), alleging that Defendants Walter Ng, Bruce Horwitz, and
26 Bar-K, Inc. breached their fiduciary duties under Title I of the Employee Retirement Income
27 Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 – 1191c, in connection with the Bar-K
28

1 401(k) Plan (the “Plan”), and seeking to enjoin further violations of ERISA and to obtain other
2 equitable relief.

3 Defendant Walter Ng admits that this Court has jurisdiction over him and that this Court
4 has jurisdiction over this action pursuant to ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1),
5 and that venue lies with the United States District Court for the Northern District of California
6 pursuant to ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2). Defendant Walter Ng further
7 acknowledges receipt of the Secretary’s Complaint (“the Complaint”) in this action and hereby
8 waives service of process of the Summons and Complaint.
9

10 The Secretary and Defendant Walter Ng have agreed that this Consent Judgment & Order
11 as to Defendant Walter Ng (“Consent Judgment”) shall fully settle all claims of the Secretary
12 asserted against Walter Ng in the Complaint. Without admitting or denying the allegations of the
13 Complaint (except as to personal and subject matter jurisdiction, which Defendant admits),
14 Defendant hereby consents to the entry of Consent Judgment as outlined below.
15

16 The Secretary and Defendant Walter Ng waive the entry of findings of fact and
17 conclusions of law and agree to the entry of this Consent Judgment in settlement of this action.
18

19 The United States Department of Labor having filed a Complaint and Defendant Walter
20 Ng having entered a general appearance; consented to the Court’s jurisdiction over Defendant
21 and the subject matter of this action; consented to entry of this Consent Judgment without
22 admitting or denying the allegations of the Complaint (except as to jurisdiction); waived findings
23 of fact and conclusions of law:
24

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

25 1. Defendant Walter Ng, since at least December 1, 2002, has been a fiduciary of the Plan
26 within the meaning of Section 3(21), 29 U.S.C. § 1002(21), of ERISA;
27 2. As a fiduciary, Defendant Walter Ng:
28

1 a. Failed to hold the assets of the Plan in a trust in violation of ERISA § 403(a), 29
2 U.S.C. § 1103(a);

3 b. Caused the Plan to engage in transactions which he knew or should have known
4 constituted a direct or indirect lending of money or other extension of credit between the Plan
5 and a party in interest, in violation of ERISA § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B);

6 c. Failed to act solely in the interest of the participants and beneficiaries of the Plan
7 and for the exclusive purpose of providing benefits to participants and their beneficiaries and
8 defraying reasonable expenses of Plan administration, in violation of ERISA § 404(a)(1)(A), 29
9 U.S.C. § 1104(a)(1)(A);

11 d. Failed to act with the care, skill, prudence, and diligence under the circumstances
12 then prevailing that a prudent person acting in a like capacity and familiar with such matters
13 would use in the conduct of an enterprise of a like character and with like aims, in violation of
14 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

15 e. Failed to act in accordance with the documents and instruments governing the
16 Plan as required by ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); and

18 f. Dealt with assets of the Plan in his own interest, in violation of ERISA §
19 406(b)(1), 29 U.S.C. § 1106(b)(1).

20 3. As a direct and proximate result of the breaches of fiduciary duties described in
21 Paragraph 2 *supra*, Walter Ng has caused Plan losses of \$1,310,252.16, including pre-judgment
22 lost-opportunity costs as calculated through June 24, 2014, and judgment is entered against
23 Walter Ng in this amount. Interest shall accrue from the date of this judgment at the rate set forth
24 in 26 U.S.C. § 6621, and this judgment shall not be satisfied until Walter Ng has remitted both
25 the judgment amount and the interest accrued pursuant to this provision.

4. Regardless of which party makes payments to the Plan, Defendant
Walter Ng is jointly and severally liable for the debt owed to the Plan, as described in Paragraph
3 *supra*, until all losses have been fully restored.

5. Defendant Walter Ng shall be permanently enjoined from serving as a fiduciary or service provider to any employee benefit plan subject to ERISA.

6. Defendant Walter Ng shall be permanently enjoined from violating any of the provisions of Title I of ERISA, 29 U.S.C. §§ 1001-1191c.

7. Upon entry of judgment against Defendant Bar-K, Inc., the Court shall appoint an Independent Fiduciary for the Plan. Defendant Walter Ng shall cooperate fully with the Independent Fiduciary appointed by the Court in providing documents or information he may have relevant to the Plan's administration and management.

8. The Independent Fiduciary shall be entitled to reasonable compensation, fees and expenses (“Independent Fiduciary Costs”) for which Defendant Walter Ng shall be jointly and severally liable with Defendant Bar-K Inc.

9. In accordance with the governing Plan documents, the Plan shall advance the Independent Fiduciary's Costs, to be reimbursed to the Plan by Defendants Bar-K Inc. and Defendant Walter Ng. Upon later motion by the Secretary, he will seek that this Court enter an Amended Consent Judgment and Order against Defendants Bar-K, Inc. and Walter Ng for the sum of such Independent Fiduciary Costs.

10. Each party to this Consent Judgment agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding, including but not limited to attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

11. The parties to this Consent Judgment expressly waive any and all claims of any nature which each may have against the other, or any of their officers, agents, attorneys, employees or representatives, arising out of or in connection with the allegations contained in the Complaint

1 on file in this action, any other proceedings or investigation incident thereto or based on the
2 Equal Access to Justice Act, as amended.

3 12. Nothing in this Consent Judgment is binding on any governmental agency other than the
4 United States Department of Labor, Employee Benefits Security Administration.

5 13. Based on the representations made in the Declaration of Financial Status, executed in two
6 parts by Walter Ng on June 30 and July 1, 2014, the Secretary waives his right to bring an action
7 to enforce collection on the judgment at this time. Should the Secretary receive information
8 demonstrating the debt described in Paragraph 3, *supra*, is collectible, the Secretary reserves his
9 right to bring a collection action at that time.

10 14. This Consent Judgment does not in any manner affect the right of the United States
11 Department of Labor to assess a civil penalty of twenty percent on amounts recovered pursuant
12 to ERISA § 502(l), 29 U.S.C. § 1132(l). Defendant Walter Ng agrees to waive the notice of
13 assessment and service requirement of 29 C.F.R. § 2570.83. Upon assessment, payment shall be
14 made immediately unless the Defendant files a petition for waiver or reduction of the penalty as
15 provided for in 29 C.F.R. §§ 2570.83–2570.87 and the Secretary agrees to waive or reduce the
16 penalty. Defendant may not challenge the applicable recovery amount, the validity of the
17 violations alleged, or his liability for the violations.

18 15. This Court shall retain jurisdiction of this matter for purposes of enforcing this Consent
19 Judgment.

20 22 16. By signing their names to this Consent Judgment, the parties hereto represent that they
21 are informed and understand the effect and purpose of this Consent Judgment.
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1 17. This Consent Judgment may be executed in counterparts, each of which shall be deemed
2 to be an original, but all of which, taken together, shall constitute one and the same instrument.
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The Court directs the entry of this Consent Judgment as a final order.

5 IT IS SO ORDERED
6 Dated: January 6, 2015
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JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

9 Entry of this Consent Judgment is hereby consented to:
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For Plaintiffs

Dated: 12/18/14

M. PATRICIA SMITH
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

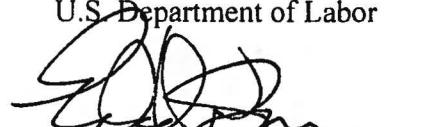
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Attorneys for Plaintiff Secretary of Labor,
U.S. Department of Labor

For Defendant Walter Ng

Dated:


ED SWANSON
Swanson & McNamara LLP

Attorneys for Defendant Walter Ng